APPENDIX A.

DECEMBER 7, 1910.

To the Interstate Commerce Commission, Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT IN CONNECTION WITH THE FOLLOWING TARIFFS.

Railroad reference.	Interstate Commerce Commission tariff.	Of agent.
Tariff No. 1–L and Supplements 1, 2, and 3 thereto.	No. 13 and Supplements 1, 2, and 3 thereto.	C. W. Bullen.
	No. 225 and Supplements 1, 2, and 3 thereto.	J. F. Tucker.
	No. 929 and Supplements 1, 2, and 3 thereto.	R. H. Countiss.
Tariff No. 4–H and Supplements 1, 2, 3, and 4 thereto.	No. 14 and Supplements 1, 2, 3, and 4 thereto.	C. W. Bullen.
	No. 226 and Supplements 1, 2, 3, and 4 thereto.	J. F. Tucker.
	No. 928 and Supplements 1, 2, 3, and 4 thereto.	R. H. Countiss.
Circular No. 16–F and Supplement 4 thereto.	No. 9 and Supplement 4 thereto.	C. W. Bullen.
	No. 168 and Supplement 4 thereto.	J. F. Tucker.
	No. 915 and Supplement 4 thereto.	R. H. Countiss.

In the name and on behalf of each of the carriers, parties to the above-named tariffs, the undersigned, acting as Agents and Attorneys or under authority of concurrences on file with the Commission from each of the said carriers, respectfully

petition the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs from eastern shipping points designated to the Pacific coast terminal points and other points designated, lower than rates concurrently in effect from intermediate points, and to intermediate points in Canada and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington, and points east thereof.

This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points, such lower rates being necessary by reason of—

Competition of various water carriers and of carriers partly by water and partly by rail operating from Atlantic seaboard ports to Pacific coast ports; competition of various water carriers operating from foreign countries to Pacific coast ports and competition of the products of said foreign countries with the products received at the said eastern shipping points; competition of the products of Eastern and Atlantic coast points with the products moving to the Pacific coast from points in the interior; competition of Canadian rail carriers not subject to the Interstate Commerce Act; competition of the products of Canada moving by Canadian carriers with the products of the United States; rates established via the shorter or more direct routes, but applied also via the longer or more circuitous routes.

Copies of the tariffs and circular in connection with which relief from the fourth section is de-

sired, and to which reference is made in the foregoing, are attached hereto and made a part hereof.

Yours, very truly,

J. F. TUCKER, *Agent.*

Subscribed and sworn to before me this 9th day of December, 1910.

ROLAND A. SPERRY,
Notary Public.

My commission expires November 23, 1913.

C. W. BULLEN, *Agent.*
By JAS. BLOOMINGDALE.

Subscribed and sworn to before me this 12th day of December, 1910.

FREDERICK B. BLACKMAN,
Notary Public.

My commission expires March 30, 1911.

R. H. COUNTISS, *Agent.*

Subscribed and sworn to before me this 9th day of December, 1910.

JOHN N. KERRY,
Notary Public.

My commission expires May 15, 1911.

APPENDIX B.

CHICAGO, *July 9, 1914.*

Application for modification of Fourth Section Order No. 124—Applications Nos. 205, 342, 344, 349, 350, 352.

The INTERSTATE COMMERCE COMMISSION,

Washington, D. C.

GENTLEMEN: In the name and on behalf of each of the carriers parties to the above-named applications for relief from the provisions of the fourth section of the act to regulate commerce, as amended June 18, 1910, the undersigned, acting as agent and attorney or under authority of concurrences filed with the commission for each of the said carriers, respectfully petitions the Interstate Commerce Commission:

1. To extend the effective date of its Fourth Section Order No. 124 of June 22, 1911, until October 1, 1914, to enable carriers to publish, file, and make effective rates to conform with requirements of the order except on commodities shown in the attached list, and designated as schedule "C," and as to those commodities extend the effective date of its order until January 1, 1915.

2. To modify its order so that the zone boundary lines provided therein will conform to the territorial boundary lines approved by the commission after hearing and investigation (see I. and S. Docket 207; I. C. C. 28–1) and now published in

the Westbound Transcontinental Tariff, such modification being necessary to permit the uniform application of rates from eastern points of origin to both Pacific coast terminal and intermediate points under Fourth Section Order No. 124.

3. To grant the interested carriers a hearing beginning on or about October 6, 1914, upon the commodities enumerated in schedule C, it being the purpose of the carriers to show that as to these commodities the conditions are such as to justify a greater degree of relief than is afforded under the original Fourth Section Order No. 124.

There is attached hereto and made a part hereof three exhibits, as follows:

Schedule A: A list of commodities upon which the rates to the Pacific coast terminals will apply as the maximum to intermediate points of destination, and upon which no relief is requested. This schedule contains many commodities, particularly those in which the individual is much interested as a consumer, such as fruit, grain, flour, vegetables, and other products of the soil; agricultural implements, building material, etc., upon some of which the rates are low but upon which the carriers will continue to apply the rates as the maximum.

Schedule B: A list of commodities subject to the competition at the Pacific coast terminals of carriers by sea, but upon which the rates to said Pacific coast terminals via the rail routes are generally not less than $2 per 100 pounds when in less than carload shipments, and $1 per 100 pounds when in carload shipments, and as to which the carriers will observe the provisions of Fourth Section Order No. 124.

Schedule C: A list covering generally manufactured commodities subject to the most severe competition at the Pacific coast terminals of carriers by sea, and upon which the rates to said Pacific coast terminals via the rail routes are less than $2 per 100 pounds when in less than carload shipments and less than $1 per 100 pounds when in carload shipments, which rates are subnormal to a marked degree, measured by any recognized standard, such as rates fixed by the commission as reasonable rates in and of themselves from eastern points to the territory west of the Missouri River, but are necessary to move a share of this sea-competitive traffic via the rail routes; also to enable manufacturers and shippers at points of production not located directly upon the Atlantic seaboard to share in the trade of the Pacific coast.

The commission stated in its opinion that the average rate obtainable upon traffic to the Pacific coast terminals was sufficient to warrant the application of all such rates in accordance with the original Order No. 124; but it is pointed out that these schedule C rates, which, measured by recognized standards, are so low as to warrant the suggestion that they should not be used as the measure of or basis for rates to intermediate points, since it may fairly be said that, while the acceptance of such traffic by the rail carriers will not result in a burden upon other traffic, that the use of the rates as a basis for rates to intermediate points will make necessary an adjustment of rates on other traffic not proper under the circumstances.

What carriers now ask is sufficient time to place before the commission with respect to the commodities shown in schedule C such evidence as will,

in their opinion, completely justify a greater degree of relief from the provision of the amended fourth section than is granted in Order No. 124, it being understood that, if this petition is granted, order issued by the commission after hearing the testimony which it is desired to present will be promptly complied with.

The time for filing applications for relief from the amended fourth section expired February 17, 1911, and these cases were heard in March, 1911. They were the first important cases of this kind dealt with under the amended law. Its meaning was not as fully defined and understood as it has now become and carriers were not prepared nor was it possible for them to prepare themselves to show the conditions surrounding the traffic involved as it should be shown and as they feel now that they are prepared to show. Complete data was not at hand nor available, nor had the method of analyzing these things been developed to the perfection since obtained. Carriers feel that under later practice and experience they can present convincing facts and arguments in support of certain modifications which should be before the commission before the case is finally disposed of.

As the result of conference between shippers and carriers since the original order was made, and after informal conference with commission, commodity rates from all eastern points to intermountain territory concerned were established upon all commodities in the list that moved in carloads in sufficient volume to justify commodity rates. The adjustment is generally satisfactory to interior shippers, and the commission by formal order per-

mitted the rates to go into effect. These rates reduced the then existing rates very considerably and, it seems fair to state, are reasonably satisfactory to shippers. The complaints of interior shippers have almost wholly been directed against discrimination and but little against the rates in and of themselves. Before Order No. 124 was made the commission reduced all the class rates from eastern points to all intermountain territory. This adjustment, in order to maintain a reasonable relation, caused a reduction either by order of the commission or voluntary act of carrier from all western territory to intermountain territory not only in the class rates but, because of changes in the westbound commodity rates, certain changes had to be made in the eastbound commodity rates to intermountain territory. All these changes in rates at intermountain points have given the intermountain territory such a large measure of relief in the direction of its request and that to-day the intermountain territory is not suffering in its competition with terminal points on account of rates via the rail routes.

On account of the large amount of revenue and changes in rate relation involved, it is hoped the commission will grant this application, so that before final action is taken the situation as it exists to-day will be clearly before them.

Yours, respectfully,

R. H. COUNTISS, *Agent.*

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1916

SYNOPSIS AND INDEX.

The District Court, in enjoining the orders of the Commission and the tariffs of carriers filed pursuant thereto, exceeded its authority. It had no jurisdiction in advance of an application to the Commission to entertain a petition filed by organizations admittedly having no financial interest in the controversy. It is submitted that *the decree of the District Court should be reversed* and that *the cause should be remanded with directions that it be dismissed for want of jurisdiction.*

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, Atchison, Topeka & Santa Fe Railway Company, et al., appellants,

v.

MERCHANTS & MANUFACTURERS' TRAFFIC Association of Sacramento, Traffic Bureau of San Jose Chamber of Commerce, et al., appellees.

No. 452.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States District Court for the Northern District of California, enjoining the orders of the Interstate Commerce Commission of January 29, 1915, and April 30, 1915, in fourth section applications Nos. 205, 342, 343, 344, 350, and 352, in so far as the Commission by said orders had granted to the rail carriers permission to charge for the transportation of westbound transcontinental freight destined to

Sacramento, Stockton, San Jose, and Santa Clara, Cal., greater amounts than are concurrently charged for the like carriage of similar freight to San Francisco and Oakland, Cal., and enjoining in part the tariffs, supplements, and reissues *filed and published by said carriers pursuant to said orders and in effect.* An opinion was filed by Circuit Judge Morrow, concurred in by District Judge Dooling, Record, page 358, District Judge Bledsoe dissenting, Record, page 365. *Merchants' & Mfrs.' Traffic Assn. et al.* v. *United States et al.,* 231 Fed., 292.

The fourth section of the act as it originally read prohibited carriers under substantially similar circumstances and conditions from charging more for a shorter than for a longer distance over the same line in the same direction, where the shorter was included in the longer distance. Under this section as interpreted by this court the carrier initiated the rate without any action on the part of the Commission. Section 4 was amended June 18, 1910, whereby carriers were prohibited from charging more for a shorter than for a longer distance unless upon application the Commission should authorize the carrier to charge less for a longer than for a shorter distance. The words " under substantially similar circumstances and conditions " appearing in the original fourth section were left out of the amended fourth section. The construction given to the fourth section as amended, however, by this court is that competition which materially affects the rate of

carriage to a particular point is a dissimilar circumstance and condition and warrants the Commission in authorizing a departure from the fourth section whereby the carriers may charge less for a longer haul to a competitive point than for a shorter haul to a noncompetitive point. *Intermountain Rate case,* 234 U. S., 476; *East Tennessee V. & G. Ry. Co.* v. *I. C. C.,* 181 U. S., 1.

The amendment of 1910 made all existing rates which were higher to intermediate points unlawful, unless approved by the Commission on applications which were required to be filed within six months after the passage of the act.

At the time of the passage of the amendment higher rates to intermediate points were almost as numerous as lower rates. The rate systems of carriers were largely constructed upon the basing-point system. The practical effect of the amendment was to force a readjustment of rate schedules, subject to the Commission's approval.

In February, 1911, the various transcontinental carriers filed with the Commission their applications for relief from the provisions of the fourth section as to rates on commodities from eastern defined territories to Pacific coast terminals and intermediate points. These applications sought authority to continue the then current practice of these carriers of making commodity rates to the Pacific coast lower than to intermediate points. Extensive hearings were held at Washington in

March and April, 1911, at which the carriers presented evidence and argument in favor of their various applications for relief.

In disposing of these applications the Commission divided the United States into five zones, denied to the carriers authority to continue lower rates from points in zone 1 to the Pacific coast than to intermediate points, and authorized the maintenance of higher rates to the intermediate points than to the coast on traffic originating in zones 2, 3, and 4. The carriers filed injunction proceedings in the Commerce Court to set aside the order of the Commission as not being responsive to the applications and beyond the power of the Commission, for the reason, as urged, that the Commission in establishing such zones had exceeded its authority. On November 9, 1911, the Commerce Court set aside the order of the Commission. *Atchison, T. & S. F. Ry. Co. et al.* v. *United States,* 191 Fed., 856. Upon appeal from that decision this court, on June 22, 1914, reversed the judgment of the Commerce Court. *Intermountain Rate case,* 234 U. S., 476.

In July, 1914, the transcontinental carriers filed with the Commission a supplemental application asking, among other things, that the requirements of the order as to certain commodities, designated for convenience as Schedule C, be extended until January 1, 1915. The carriers also asked for a further hearing concerning the rates on commodities enumerated in Schedule C, alleging that as to such commodities the competitive conditions justified a

greater degree of relief than was afforded under the original order. The Commission, responsive to this application, extended the effective date of the order as to Schedule C until January 1, 1915. A hearing was held at Chicago October 6, 1914, and after full consideration the Commission, under date of January 29, 1915, filed its supplemental report, wherein it was observed, Record, page 298, that:

> No evidence has been presented in this case to show that it is necessary to apply the coast terminal rates to any points except the ports of call on the Pacific coast at which the Atlantic-Pacific steamship lines deliver freight. We shall authorize these carriers to establish the rates proposed to these ports upon all the articles in the list, excepting those to which exceptions have been noted.

In its order filed on the same date as the report last cited, Record, pages 323, 327, the Commission maintained the original division of the United States into five zones, known, respectively, as zones 1, 2, 3, 4, and 5, and provided:

> That in the observance of this order as to the rates on Schedule C commodities the Pacific coast terminals shall consist of San Diego, Wilmington, East Wilmington, San Pedro, San Francisco, and Oakland, Cal., Portland, Oreg., Tacoma and Seattle, Wash., only.

In the supplemental report the carriers were asked to submit a plan for the construction of rates to intermediate points in what was termed "back-

haul" territory, the Commission having suggested that the rates to these points might be somewhat lower than full combination of local and coast terminal rates.

The carriers submitted such proposed rates, but they were not approved by the Commission, and by an order dated April 30, 1915, the Commission authorized the carriers to construct such rates by adding to terminal rates not more than 75 per cent of the local from terminal to destination. In its report filed on the same date, Record, pages 343–344, the Commission, in this connection, said:

> In our former report, *supra,* we said that the terminal rates should be confined to the points at which the Atlantic-Pacific steamship lines deliver their freight. At the time the testimony was taken the Panama Canal had been open but a few weeks, and the record then showed the delivery of this freight only at certain points. Proof has since been offered showing the delivery and receipt of this freight at East San Pedro, Cal.; Astoria, Oreg.; Vancouver, Bellingham, South Bellingham, Everett, Aberdeen, Hoquiam, and Cosmopolis, Wash. The carriers serving these points have conceded that these points are entitled to the same rates as other terminal points. The circumstances and conditions at the points named appear to be similar to those found at the points named as terminals in the former report, and the order will be modified so as to permit the

establishment of the terminal rates proposed to the points above named.

Accordingly, the points last named, being shown to be ports of call for ocean steamships for the delivery and receipt of freight, were included as places to which the carriers might apply terminal rates.

The order of April 30, 1915, was predicated upon the conclusion of the Commission that the competitive justification for authorizing the carriers to give terminal rates was the situation of the city upon the ocean, where ocean-going vessels could call and receive and deliver freight, and that if an additional rail haul from the ocean is necessary in order to make delivery, something should be added to the terminal rates for the transportation to the point of delivery.

Prior to this time a large number of inland cities in California, Washington, and Oregon, including the cities of Sacramento, Stockton, San Jose, and Santa Clara in California, had been given terminal rates by the rail carriers (Record, page 272), and the ocean carriers between the east and west coasts of the United States, in order to meet this competition and thereby to secure tonnage for their ships, were making a practice of absorbing the inland locals to these points from the ports of call. The cities of Sacramento, Stockton, San Jose, Santa Clara, and other cities and towns not situated directly upon the ocean thus secured terminal rates to

which their location did not naturally entitle them. The passage of the Panama Canal act and the opening of the Panama Canal caused the ocean carriers to discontinue absorbing the local rail rates, for by so doing the ocean carriers would have subjected themselves to the application of the act to regulate commerce and to the jurisdiction of the Commission. This the ocean carriers desired to avoid in order that they might change their rates at will and make special contracts at different rates, which they could not do if governed by the act to regulate commerce. The discontinuance of these absorptions by the ocean carriers took away the artificial competitive condition thereby created and placed the points last named in a different situation as to competition than points which are ports of call for ocean steamships.

The Commission, upon complaint of the Santa Rosa Traffic Association, on June 4, 1912, had held that it was an unlawful discrimination against Santa Rosa, an interior point adjacent to the ocean, but not on deep water, for the transcontinental carriers to continue to give terminal rates to Santa Clara and San Jose, two of the complaining cities herein, and not to apply the same rates to Santa Rosa. *Santa Rosa Traffic Association* v. *Southern Pacific Co. et al.*, 24 I. C. C., 46; 29 I. C. C., 65. The transcontinental carriers, under the order of the Commission, having the option of withdrawing terminal rates from San Jose and Santa Clara or

of extending such rates to Santa Rosa, adopted the former alternative.

Thereupon complaint was made to the Commission by San Jose and Santa Clara that the withdrawal of terminal rates from those interior points and the contemporaneous continuation of such rates to 182 other interior points would subject San Jose and Santa Clara to unjust discrimination. Record, page 266. The Commission in the San Jose case, decided December 29, 1914, after noting the fact that ocean-going vessels actually discharged freight from the Atlantic seaboard at San Francisco, Oakland, San Diego, San Pedro, Wilmington, and East Wilmington, Record, page 271, said:

> If the transcontinental carriers, in competition with the ocean lines, see fit to reduce transcontinental commodity rates to these particular points to lower than a normal basis, they can not be charged with unjust discrimination for not extending the same rates to other points not so advantageously situated as not being points of direct contact with Atlantic-Pacific ocean competition.

The Commission concluded the opinion last mentioned with the observation, Record, page 273, that:

> The matter of the extension of terminal commodity rates to interior California points is under consideration by the Commission on carriers' Fourth Section Applications Nos. 205, etc., and will be disposed of there.

The applications referred to are the applications out of which arose the orders specifically attacked in this proceeding. The transcontinental carriers, pursuant to those orders, readjusted their rates as to schedule C commodities by the filing of tariffs which went into effect without suspension by the Commission.

The Merchants and Manufacturers' Traffic Association of Sacramento, Traffic Bureau of San Jose Chamber of Commerce, Stockton Traffic Bureau, and the city of Santa Clara thereupon filed a petition in the United States District Court for the Northern District of California against the United States, Interstate Commerce Commission, and the carriers which had made the fourth section applications before the Commission, seeking to enjoin the orders of the Commission and to restrain the carriers from collecting rates in accordance with the tariffs filed by virtue of said orders. The petition alleged that the orders of the Commission authorizing the withdrawal of terminal rates from Sacramento, Stockton, San Jose, and Santa Clara operated to discriminate against the cities named in favor of the cities to which the carriers by said orders were permitted to give terminal rates. This proceeding for an injunction was filed as an original proceeding in court without any prior application to the Commission.

The District Court, in its decree, Record, page 371, enjoined the tariffs which had been filed and

published by the carriers and which were in effect—

> * * * in so far as they make or impose a charge for the transportation by rail of westbound transcontinental freight * * * destined to Sacramento, Stockton, San Jose, and Santa Clara, California, greater in amount than is concurrently charged for the like carriage of like freight to San Francisco and Oakland, California. * * * and the enforcement thereof should be enjoined; *and the said tariffs, supplements, and reissues above mentioned in the particulars before stated are hereby canceled and set aside.* [Italics ours.]

The District Court also by its decree, Record, page 371, perpetually enjoined the Interstate Commerce Commission, the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Denver & Rio Grande Railroad Company, Southern Pacific Company, Union Pacific Railroad Company, and Western Pacific Railroad Company—

> * * * from enforcing or acting in accord with or under the orders of the Interstate Commerce Commission of January 29, 1915, and April 30, 1915, in fourth section applications Nos. 205, 342, 343, 344, 350, and 352, and from enforcing, charging, or collecting freight charges prescribed in the tariffs filed by the rail carriers, respondents herein, under or pursuant to the above-men-

tioned orders of the Interstate Commerce Commission * * * *in so far as said orders, tariffs, supplements, or reissues authorize, make, or impose a charge for the transportation by rail of westbound transcontinental freight * * * destined to Sacramento, Stockton, San Jose, and Santa Clara, California, greater in amount than is concurrently charged for the like carriage of like freight to San Francisco and Oakland, California.* [Italics ours.]

The United States, the Interstate Commerce Commission, and the carriers parties to the suit appealed from the judgment of the District Court, and upon application duly made therefor Mr. Justice McKenna granted an order superseding the judgment and decree of the lower court until this case shall have been heard by this court.

ARGUMENT.

I.

THE COMMISSION HAD JURISDICTION TO PRESCRIBE THE EXTENT TO WHICH CARRIERS MIGHT BE RELIEVED FROM THE OPERATION OF THE FOURTH SECTION.

(*a*) *The orders were responsive to the carriers' applications.*

Section 4 of the act to regulate commerce, as amended June 18, 1910, provides that carriers subject to the act may not charge more in the aggregate for a shorter than for a longer haul over the same line and in the same direction where the

shorter is included within the longer distance. It provides further, however:

> That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and *the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section.* [Italics ours.]

Prior to the amendment of 1910 carriers were permitted to initiate without authority of the Commission higher rates for shorter than for longer distances. By that amendment, however, the consent of the Commission was made a condition precedent to the lawfulness of such higher rates. It has been heretofore noted that in February, 1911, the various transcontinental carriers filed with the Commission their applications for relief from the provisions of the fourth section as to rates on commodities from eastern defined territories to Pacific coast terminals and intermediate points. These applications were granted in part and denied in part, the Commission establishing zones of influence of competition. After this order of the Commission was sustained in the *Intermountain Rate case,* 234 U. S., 476, the transcontinental carriers in July, 1914, filed with the Commission their application asking that the requirements of the order as to

Schedule C be extended. In accordance with this application there was a hearing concerning the rates on commodities enumerated in Schedule C, and after full consideration the Commission, in the exercise of the authority conferred upon it by section 4—namely, " from time to time [to] prescribe the extent to which such designated common carrier may be relieved from the operation of this section "—made the orders in controversy whereby a greater extent of relief from the provisions of the fourth section was given to carriers as to points accessible to ocean steamships than to cities not so situated.

The majority of the District Court held, Record, page 364, that—

> There was, therefore, no application on the part of the carriers, under section 4 of the act to regulate commerce, to be authorized to charge less for a longer (to San Francisco and Oakland) than for a shorter distance (to Sacramento, Stockton, San Jose, and Santa Clara).

The applications of the carriers were to charge more to *intermountain territory* than to San Francisco, Oakland, Sacramento, Stockton, San Jose, Santa Clara, and other Pacific coast cities. The Commission, by reason of the competitive conditions at San Francisco and other cities similarly situated, authorized a greater extent of relief as to such ocean terminals than to Sacramento and other cities not accessible to ocean steamships.

If the Commission in granting relief is confined to the particular relief applied for by the carriers—that is to say, if the Commission upon applications for relief to San Francisco, to Sacramento, and to 100 other places, must grant the exact relief asked for as to all of those places or refuse it as to all—then its power from time to time to prescribe *the extent of the relief* that may be given carriers from the operation of the fourth section is rendered nugatory. If the opinion of the lower court should be sustained, the Commission would become simply a place where applications of carriers might be filed to be automatically granted or refused *in toto,* without any power or discretion on the part of the Commission to prescribe the extent to which relief might be allowed.

The effect of the decision of the District Court is that an application to maintain higher rates to intermountain territory than to San Francisco can not lawfully be granted by the Commission, if thereby the rates to Sacramento and other interior points are made higher than the rates to San Francisco. As no application to charge less to a competitive point can be granted by the Commission without making the rates lower to that point as compared with other points, not so highly competitive, to which the same extent of relief is not given, it is manifest that the power to grant relief to the carriers under the provisions of the fourth section could never be exercised if the doctrine announced

by the District Court should be sustained. It would be demanding the impossible to say that the carriers should include in their applications all the innumerable places that might be affected by the lower rates to a competitive point with respect to which relief is asked.

The District Court treated these applications as referring to rates between San Francisco and Sacramento alone, considering San Francisco as the long haul and Sacramento the short haul, whereas the applications were to charge *more to intermountain territory* than to all these Pacific coast points. The Commission, under the act, had the power to prescribe the extent of relief to each point, and that it did. It gave the carriers relief as to San Francisco and also gave them relief as to Sacramento, Stockton, San Jose, and Santa Clara. The places last mentioned not being similarly situated with respect to competitive conditions as San Francisco, a greater extent of relief was accorded the carriers as to San Francisco and other ocean terminals than to Sacramento and other non-ocean terminals.

While there was no application on the part of the carriers to maintain higher rates to Sacramento than to San Francisco, there was an application to maintain higher rates to intermountain territory than to Sacramento, and there was an application to maintain higher rates to intermountain territory than to San Francisco. The applications of the

carriers were passed upon by the Commission, having in view the competitive conditions at each place with respect to which the carriers asked for relief. The orders made by the Commission were directly responsive to the applications.

(*b*) *The District Court assumed to have greater rate-making powers than the Commission.*

If it were true, as held by the majority of the court below, that the Commission in granting permission to the carriers to charge more to intermountain territory from the east than to San Francisco, and more to intermountain territory from the east than to Sacramento, had to grant the applications just as made, and that to give greater relief to San Francisco by reason of the greater competition there than at Sacramento would not be responsive to the applications, because the result would be to increase the rates to Sacramento, as compared with San Francisco, *then the like objection could be made to the decree entered by the District Court.* That court in its decree declared that the rates must be the same to Sacramento as to San Francisco, and if this order of the court were sustained the result would be to increase the rates to Colfax, Marysville, and numerous other points as compared with Sacramento. If the Commission had no power to make the orders because the indirect effect might be to increase the rates to Sacramento, as compared with San Francisco, how could the District Court, without any application by the carriers at all, make

an order which would increase the rates to Colfax and other points as compared with Sacramento? The District Court not only assumed administrative functions with regard to rates expressly delegated by law to the Commission, but the District Court assumed to have a greater power than the Commission with respect to rates, for there was no application whatever by any carrier to charge more to Colfax, Marysville, and many other points than to Sacramento. Indeed, the District Court decreed the same transcontinental rates to Sacramento, Santa Clara, Stockton, and San Jose as to San Francisco not only without any application by the carriers but over the objection and protest of the carriers.

(*c*) *The judgment of the District Court is in direct conflict with the opinion of this court in the Intermountain Rate case, 234 U. S., 476.*

In the *Intermountain Rate case* the claim of the carriers was that the Commission had no power to establish zones of influence of competition or to take into consideration the relative effects of competition at different points. It was urged that the Commission had no power to do more than exercise its general powers concerning the reasonableness of rates at all points. This court, however, upheld the power of the Commission to consider the relative effect of competition in different zones and declared that the power to depart from the

provisions of the fourth section which, before the amendment, had been vested in the carriers, was by the amendment transferred to the Commission. To say that the Commission has no power to consider the relative effect of competition in different zones would be to say that the power "evaporated in the process of transfer" from the carriers to the Commission. This court, through the Chief Justice, in the *Intermountain Rate case,* 234 U. S., 476, 485, said:

> * * * it follows that in substance the amendment intrinsically states no new rule or principle, but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law.

Continuing, at page 491–494, the court said:

> The main insistence is that there was no power after recognizing the existence of competition and the right to charge a lesser rate to the competitive point than to intermediate points to do more than fix a reasonable rate to the intermediate points; that is to say, that under the power transferred to it by the section as amended the Commission

was limited to ascertaining the existence of competition and to authorizing the carrier to meet it without any authority to do more than exercise its general powers concerning the reasonableness of rates at all points. But this proposition is directly in conflict with the statute as we have construed it and with the plain purpose and intent manifested by its enactment. To uphold the proposition it would be necessary to *say that the powers which were essential to the vivification and beneficial realization of the authority transferred had evaporated in the process of transfer and hence that the power perished as the result of the act by which it was conferred.* As the prime object of the transfer was to vest the Commission within the scope of the discretion imposed and subject in the nature of things to the limitations arising from the character of the duty exacted and flowing from the other provisions of the act *with authority to consider competitive conditions and their relation to persons and places necessarily there went with the power the right to do that by which alone it could be exerted, and therefore a consideration of the one and the other and the establishment of the basis by percentages was within the power granted.* As will be seen by the order and as we have already said for the purpose of the percentages established zones of influence were adopted *and the percentages fixed as to such zones varied or fluctuated upon the basis of the influence of the competition in the designated areas.* [Italics ours.]

The orders of the Commission here in controversy permitted the carriers to fix rates to Pacific coast terminals lower than to intermediate territory, but required them so to adjust their rates under the orders as to give due effect to the influence of competition in the designated areas. In the *Intermountain Rate case* the question was as to the adjustment of rates with relation to zones of influence of competition at *points of origin.* Here the question is the adjustment of rates with relation to zones of competition at *points of destination.* The question involved in both cases is whether the Commission has power to consider the influence of competition in designated areas and to prescribe the greatest extent of relief where the competition is greatest. We submit that the decision of the lower court can not stand against the doctrine announced by this court in the *Intermountain Rate case.*

(*d*) *The Commission, of its own motion, may investigate fourth-section matters and make orders in relation thereto.*

Under the fourth section as amended authority from the Commission is a prerequisite to a departure by carriers from the operation of the fourth section. The Commission in granting relief is not confined to the particular relief asked. Indeed, under section 13 of the act the Commission has power to institute an investigation of its own motion into fourth section matters. Section 13 of

the act as amended in 1910, coincident with the amendment of section 4, provides that:

> * * * the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before said Commission by any provision of this act, or concerning which any *question* may arise under *any of the provisions of this act,* or relating to the *enforcement of any* of the provisions of this act. And the said Commission shall have the same powers and authority to proceed with *any* inquiry *instituted on its own motion* as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. [Italics ours.]

This section gives to the Commission primary and plenary authority to make the orders here in controversy, even if the investigation into the subject matter had been of its own motion instead of on application of the carriers.

The Commission in entering an order is not restricted even in ordinary cases to the precise relief asked for by the pleadings as in an action at law. Much more so is the Commission, in prescribing the

extent of relief from the provisions of the fourth section, not restricted to the precise relief asked by the carrier, for its authority under the fourth section as amended is a "primary instead of a reviewing function."

If Congress had intended that the making of an application for the exact relief to be given to a carrier under the fourth section should be a jurisdictional prerequisite to the granting of relief by the Commission, it would have provided for some notice of the application. District Judge Bledsoe, in his dissenting opinion, in this connection, said, Record, page 368:

> The absence of any provision for notice, the empowering of the Commission to afford relief "from time to time," together with the comprehensive phraseology of sections 13 and 15, *supra*, lead me to conclude that the hearing, investigation, and order countenanced by the act are to be had "upon application" of the carrier or on the initiative of the Commission as the circumstances may demand.

(*e*) *Notice to shippers of carriers' fourth-section applications not prerequisite to validity of Commission's orders.*

The act does not require a carrier in filing rates with the Commission to give notice to any one. Rates so filed with the Commission are published in the manner specified in the act, and such publication constitutes notice to all concerned. The orig-

inal fourth section required no prior notice of rates filed thereunder and the amended fourth section likewise makes no provision for notice of an application by a carrier for relief from the long-and-short-haul provisions of the act.

An application by a carrier under the fourth section is not a proceeding between the carrier and some designated party to whom notice must be given, but is a proceeding between the carrier and the general public as represented by the Commission. Notice to the public of such an application or of a hearing thereon is no more required than is notice to the public of rates filed by the carrier where no previous consent of the Commission is needed. If all persons who are or may be interested must be notified in order to give the Commission jurisdiction over a fourth-section application, then as to such applications on transcontinental business every shipper in the United States would have to be notified, since all are either actually or potentially shippers of transcontinental traffic.

(*f*) ***The tariffs filed by the carriers and accepted by the Commission may be considered as applications.***

It appears from the record that the carriers had filed tariffs in accordance with the permission granted by the Commission and that these tariffs had been officially promulgated, and *were in effect at the time of the hearing in the court below.* The carriers made no objection to the orders and the tariffs so filed and accepted by the Commission

might fairly have been considered as applications. Section 15 of the act provides that:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint *or upon its own initiative without complaint,* at once, and if it so orders, *without answer or other formal pleading by the interested carrier or carriers,* but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, * * *. [Italics ours.]

The case of *United States* v. *Louisville & Nashville Railroad Company,* 235 U. S., 314, we submit, does not hold, as the lower court assumed, that the relief granted by the carrier must be identical with that asked in the application. This court in that case, at page 322, said:

> * * * the right to continue it [departure from fourth section] had been expressly pro-

> hibited by statute until on application made to the Commission *its consent to that end was given.* [Italics ours.]

The point considered in that case was the lack of consent of the Commission for the carrier to depart from the fourth section and not the failure to file an application with the Commission. In the case at bar consent was given by the Commission to the carriers to depart from the fourth section, and there is nothing in the decision referred to to sustain the proposition that such consent is invalid unless preceded by a formal application requesting the particular relief granted.

II.

THE DISTRICT COURT HAD NO JURISDICTION TO ANNUL ANY PORTION OF THE ORDERS OF THE COMMISSION AND TO SUBSTITUTE AN ORDER OF ITS OWN FOR THOSE OF THE COMMISSION.

(*a*) *The District Court, in attempting by its decree to prescribe the extent of relief to carriers under the fourth section, substituted its discretion for that of the Commission.*

The District Court enjoined the orders of the Commission in so far as they permitted the carriers to file and charge lower rates to San Francisco and other ocean terminals than to Sacramento and other points not situated on the ocean. The decree of the District Court in effect, if indeed not in direct terms, constitutes an administrative order *judi-*

cially made that the carriers shall charge no more to Sacramento, Stockton, San Jose, and Santa Clara than to San Francisco and Oakland.

In *United States* v. *Louisville & Nashville R. Co.,* 235 U. S., 314, this court, at page 320, said:

> * * * it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn., etc., Ry. Co.* v. *Interstate Commerce Commission,* 181 U. S., 1, 23–29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra,* show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since if the view of the statute upheld below be

> sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S., 88, 100, this court observed:

> The courts can not settle the conflict, nor put their judgment against that of the rate-making body * * *.

In *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S., 541, 547, this court said:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling.

In *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S., 481, 494, the court said:

> In considering section 15 in the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, just decided, *ante*, p. 452, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency.

In *Illinois Central R. Co. et al* v. *Interstate Commerce Commission,* 206 U. S., 441, the court said:

> And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.

In the *Los Angeles Switching Case,* 234 U. S., 294, 314, the court said:

> The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the court.

In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.,* 218 U. S., 88, 103, the court declared:

> The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result this court has taken occasion to characterize. "They assail," it was said, "the wisdom of Congress in conferring upon the Commission the power * * * or attack as crude or inexpedient the action of the Commission in the performance of the

> administrative functions vested in it, and upon such assumption invoke the exercise of an unwarranted judicial power to correct the assumed evils." *Interstate Commerce Commission* v. *Illinois Central Railroad Company,* 215 U. S., 452, 478.

In *Interstate Commerce Commission* v. *Union Pacific R. Co.,* et al., 222 U. S., 541, 550, this court said:

> With that sort of evidence before them rate experts of acknowledged ability and fairness and each acting independently of the other may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's findings on such facts conclusive.

The Commission by its orders adjusted transcontinental rates upon the basis of zones of competitive influence. The petitioners representing non-ocean terminal cities in the District Court alleged that the orders of the Commission unjustly discriminated against them. In attempting to adjust rates to competitive conditions so as to insure equality and justice to carriers, shippers, and communities, necessarily some communities may con-

ceive themselves aggrieved by any order which the Commission may enter. Having this in view Congress has vested the Commission with jurisdiction and has provided it with adequate machinery to investigate and to pass upon the facts of any given case and to make such orders as will, in the discretion of the Commission, best subserve the public interest and abate discrimination.

(*b*) *The petitioners, without prior application to the Commission for relief, brought this suit in the District Court, alleging that they were discriminated against by the orders of the Commission.*

The fourth section of the act refers exclusively to carriers, and prescribes the manner in which the designated rates are to be made. There is no provision under that section whereby localities claiming to be discriminated against by rates so made may, by going in the first instance to the courts, ask them to adjust rates to competitive conditions and modify or change the orders in which the Commission's sanction of such rates has been expressed.

If the petitioners in the District Court conceived themselves aggrieved by the orders of the Commission, the procedure for redress is provided by section 13 of the act as amended June 18, 1910, as follows:

> That any * * * association, or any mercantile * * * or manufacturing society or other organization, or any body politic or municipal organization * * * complaining of anything done or omitted to be done by

> any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition * * *. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

When an order of the Commission affects a community which has not participated in the investigation precedent to such order, that community, under the act to regulate commerce, before appealing to the courts, must go before the Commission and ask for relief. And until such hearing has been had and an order based thereupon has been entered by the Commission, it is not within the province of any court to enter any order in the premises. Congress manifestly did not intend to divide between the Commission and the courts jurisdiction over matters of rates. That would lead to confusion and destroy the uniformity which it was the purpose of the act to bring about.

(*c*) *Suit can not be brought in the first instance in court for discrimination in rates between communities.*

In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Company* (*Burn-*

ham, Hanna, Munger case), 218 U. S., 88, 110, Mr. Justice McKenna, speaking for the court, said:

> The order of the Commission besides is strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri River cities are too high. That order is alone open to review. Whether other persons, cities, or areas of territory have grounds of complaint, the way is open by application to the Commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the Commission should first pass and of which the courts should not be called upon in advance to intimate an opinion. The reasons for this we have indicated, and they will be found at length in the cases which we have cited.

In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Company,* 204 U. S., 426, 444, it was held that rate-making matters are within the exclusive primary jurisdiction of the Interstate Commerce Commission. The court in that case, speaking through the present Chief Justice, and referring to the cases of *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S., 184; *Louisville & Nashville R. Co.* v. *Behlmer,* 175 U. S., 648; and *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 190 U. S., 273, said:

> It was pointed out that by the effect of the act to regulate commerce it was peculiarly

> within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was therefore declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule.

The following decisions of this court also illustrate the particularity with which this tribunal has safeguarded the primary jurisdiction of the Commission to pass upon rate matters.

In *Continental Wall Paper Company* v. *Voight & Sons Company,* 212 U. S., 227, 274, the court said:

> Something of the same idea of the exclusiveness of a statutory remedy finds expression in [the *Abilene case*] * * * in which it was held that a carrier could not maintain an action at common law for excessive and unreasonable freight charges exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the interstate commerce act and had not been found to be unreasonable by the Interstate Commerce Commission, * * *.

In *Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry. Co.,* 218 U. S., 88, 110, the court said:

> We have also said that the primary jurisdiction is with the Commission, the power of the courts being that of review, and is confined in that review to questions of constitutional power and all pertinent questions as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made.

In *Procter & Gamble* v. *United States,* 225 U. S., 282, 297, the court held:

> On the contrary, by a long line of decisions * * * it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act.

In *Baltimore & O. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S., 481, 493, 494–495, this court, through the present Chief Justice, said:

> * * * we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by

> the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions. * * * these amendments [of 1906] add to the cogency of the reasoning which led to the conclusion in the *Abilene case,* that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds from the evidence before it that the regulation is not unjustly discriminatory. Which would prevail? If both, *then discrimination and preference would result from the very prevalence of the two methods of procedure.* If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. [Italics ours.]

The evils pointed out by the Chief Justice in the case just cited have resulted in this case from the attempt of the District Court to make an order of its own regarding rates. The District Court en-

joined the orders of the Commission in so far as they permitted the carriers to charge higher rates to Sacramento, Stockton, San Jose, and Santa Clara than to San Francisco and Oakland, and enjoined the carriers from collecting tariff rates, which had been filed in accordance with the orders of the Commission, which were in effect at the time of the decree, to Sacramento, Stockton, San Jose, and Santa Clara and which were higher than to San Francisco and Oakland. There are more than 180 other cities and towns in California just as much entitled as Sacramento, Stockton, San Jose, and Santa Clara to the same rates as San Francisco. The District Court, in ordering the application of San Francisco rates to Sacramento, Stockton, San Jose, and Santa Clara, created a discrimination against all the other cities and towns in California similarly situated with Sacramento, Stockton, San Jose, and Santa Clara, which other cities and towns do not enjoy the same rates as San Francisco.

If the decree of the District Court should be sustained, many of those points, it may be assumed, would file their petitions before the District Court, claiming that they are similarly situated with Sacramento, Stockton, San Jose, and Santa Clara and are entitled to the same rates as San Francisco; and the District Court would have just as much power to order that such cities be given the same rates at Sacramento, Stockton, San Jose, and Santa Clara as it had to order that Sacramento, Stockton, San Jose, and Santa Clara be

given the same rates as San Francisco. Then other cities and towns might go before the Commission, where they should properly go, in applying for adjustment of rate matters. We should then have the Commission considering in certain cases the very rate matters being considered by the District Court in other cases. The District Court might decide one way and the Commission might decide another way. Which would prevail?

The petitioners in the District Court had the right under section 13 of the act to file with the Commission as an original matter a petition setting forth the facts in relation to the discrimination alleged to have resulted from the orders in question. This right petitioners in the District Court still have, but until they shall have availed themselves of the privilege and have applied to the Commission for redress of any wrong which they claim to have suffered, it is manifest that they had no lawful authority to ask the District Court to annul the orders of the Commission which they claimed subjected them to discrimination and to ask the court to make an order with respect to rates different from those which the Commission had made.

(*d*) *Petitioners at the same time are claiming under and against the orders of the Commission.*

Sacramento, Stockton, San Jose, and Santa Clara, by reason of the orders of the Commission

here in controversy, secure lower rates from the east than the carriers give to intermountain territory. If the orders of the Commission had been annulled entirely, these points would have to pay higher rates than Reno, Salt Lake City, and other points to the eastward, whereas by reason of the orders which they assail these cities have lower rates than Salt Lake City, Reno, and other eastward points. Sacramento, Stockton, San Jose, and Santa Clara are therefore claiming under the orders to the extent that such orders give them lower rates than to intermountain territory and against the orders to the extent that under the orders the rates to these places are not as low as to San Francisco and other ocean terminals. May a city at the same time claim under and against an order of the Commission?

(*e*) *The lower court erroneously suspended in part the orders of the Commission because they did not include certain cities.*

The District Court by its decree required that Sacramento, Stockton, San Jose, and Santa Clara, non-ocean terminal points, be given the same rates as San Francisco, an ocean terminal, which order the Commission had not made, and annulled in part the orders which the Commission had made, because the Commission in its orders did not include as terminal points the cities above named. The decree of the lower court challenged as invalid not

what the Commission had done but what it had not done. The power of the District Court was confined to passing upon the validity of the orders actually made, and it had no warrant of law to go beyond that. This proposition is concluded by the decision of this court in *Procter & Gamble* v. *United States,* 225 U. S., 282. Appellant in that proceeding had complained to the Commission with respect to certain demurrage regulations applied by certain carriers to its private cars and had charged that such regulations were unjust and discriminatory and in contravention of the law. The Commission, after hearing, concluded that the rules in question were consistent with the act and declined to direct their cancelation. The company thereupon sought to have the Commerce Court annul the action or nonaction of the Commission whereby its application for relief had been denied, but the Commerce Court, having assumed jurisdiction of the case, dismissed the petition *on its merits.* On appeal to this court it was held that the Commerce Court had erred in assuming jurisdiction of the cause, which was thereupon remanded to that court to be dismissed *for want of jurisdiction.* This court, at pages 296, 297, said:

> In the long interval which intervened between 1887, when the act to regulate commerce was enacted, and June 18, 1910, when the Commerce Court act was passed, *we have learned of no instance where it was held or even seriously asserted that as to subjects*

> *which in their nature were administrative and within the competency of the Commission to decide there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the Interstate Commerce Commission.* [Italics ours.]

(*f*) *The lower court exceeded its authority in attempting to enjoin the carriers from collecting rates which had been filed and published in accordance with the act to regulate commerce.*

Tariffs having been filed and published by the carriers as permitted by the orders, the rates so provided were, for the purposes of this hearing, no different from other rates which might have been published without any order by the Commission, or from other rates already in effect on the lines of the interested carriers. Certainly it would not be suggested that the District Court would have had power in *advance of a finding by the Commission* to suspend the operation of such rates already published and in effect. And it is equally apparent that the lower court was without authority to suspend any of the rates formally published and in effect in obedience to the orders here involved.

Section 1 of the Elkins Act provides as to published rates:

> Whenever any carrier files with the Interstate Commerce Commission or publishes a

> particular rate under the provisions of the act to regulate commerce * * * that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of the act.

In the case of *Dayton Coal & Iron Co.* v. *C. N. O. & T. P. Ry. Co.*, 239 U. S., 446, 451, this court, through Mr. Justice Day, declared:

> That it is essential to the maintenance of uniform rates and the avoidance of rebates and preferential treatment that the tariff rates filed with the Commission according to the interstate commerce act, while in force, *shall be the only rates which the carrier may lawfully receive* or the shipper properly pay is too thoroughly settled by the former decisions of this court to require further discussion. [Italics ours.]

Under section 6 of the act to regulate commerce a carrier can change published rates only on 30 days' notice. The Commission may suspend proposed rates if they are found to be unreasonable or discriminatory, but the carriers themselves have no power to change such rates except upon 30 days' notice. Here we have the carriers filing and publishing rates in accordance with the authority of the Commission, and, while those rates are in effect, the

District Court attempts to enjoin the carriers from collecting those rates and orders the carriers to collect no higher rates than the *rates named by the court.*

If the carriers should obey the decree of the District Court they would be violating the act to regulate commerce and would incur the penalties for collecting other than published rates. Section 6 of the act provides that—

> No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been *filed and published in accordance with the provisions of this act;* * * *.

If, therefore, the decree of the lower court should have enjoined the carriers from collecting the rates which they had filed and published in accordance with the orders of the Commission, the result would have been that the carriers would have had no legal rates at all and traffic would have been paralyzed. The decree of the lower court would have brought about chaos in the transcontinental rate situation had not supersedeas from this court issued whereby the decree of the District Court was suspended until this case could be heard by this court. It would be difficult to imagine a more striking illustration of the evils and confusion resulting from the primary interference by courts in rate-

making questions than that created by the decree here under consideration.

In *Tennessee Central Railroad Company* v. *Southern Ry. Co.,* 178 Fed., 267, the Circuit Court of Appeals for the Fourth Circuit declared:

> We find that the court below was without jurisdiction to entertain appellant's bill, for the reason that the facts and circumstances set forth in it show that the Interstate Commerce Commission has exclusive cognizance of the controversy referred to and described therein. The citizenship of the parties is of the character required by the statutes, and the amount in controversy is sufficient to give the court below jurisdiction, but the subject matter of the bill has been for good and sufficient cause—as has been demonstrated by frequent decisions of the courts—committed to the Interstate Commerce Commission for its consideration and disposition.

In *Thacker Coal & Coke Co.* v. *Norfolk & Western Railway Co.,* 68 S. E. Rep., 107, 108, the Supreme Court of Appeals of West Virginia said:

> We see that there is nothing more distinctly committed to the jurisdiction of this tribunal than the matter of rates—the schedule of rates. This schedule must go at once to this Commission, the only authority to deal with it, at least in the first instance, if the act is obeyed; a tribunal created by Congress under its exclusive power over interstate commerce and given a subject matter

> for its action. Yet a state court is asked to grant a perpetual injunction to debar a great interstate railroad from fixing rates and filing them with the Commission. A state court is asked to say that this schedule shall never reach that Commission. It does seem to me that the very statement of the proposition is its own refutation.

In *Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 171 Fed., 713, 720, an action by a shipper to enjoin the filing with the Interstate Commerce Commission of a proposed schedule of rates on coal, District Judge Keller, holding that a court had no power to issue an injunction in such a case, said:

> I can not conceive of a case in which the action of a court could exert a wider or more far-reaching effect in the way of invading the province of the Commission or be more repugnant to the general scope and purposes of the act than by issuing its injunction to prevent the filing of a schedule of rates with that body.

(*g*) *Whether competition is of sufficient potentiality to justify a departure from the operation of the fourth section, and the extent of the relief, if any, which may be granted by reason of such competition, are administrative questions committed to the discretion of the Commission and upon which the findings of the Commission based upon substantial evidence are conclusive.*

In *Loomis et al.* v. *Lehigh Valley R. Co.*, 240 U. S., 43, this court, through Mr. Justice McReynolds, at page 50, said:

> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation. * * * In the last analysis the instant cause presents a problem which directly concerns rate making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 232 U. S., 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. Co.* v. *Puritan Coal Co.,* [237 U. S., 121] *supra,* pp. 128, 129; *Penna. R. Co.* v. *Clark Coal Co.,* [238 U. S., 456] *supra,* pp. 469, 470.
>
> If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission in circumstances like those here shown to administer proper relief and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

In *United States* v. *Pacific & Arctic Co.*, 228 U. S., 87, 108, this court declared:

> The purpose of the interstate commerce act to establish a tribunal to determine the relation of communities, shippers, and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

In the case of *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S., 506, 511, Mr. Justice Van Devanter, speaking for the court, said:

> It is true, as was urged in argument, that in that [*Abilene*] case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other; and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper.

In *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S., 247, 257, 258, this court held:

> But where the suit is based upon unreasonable charges or unreasonable practices there

> is no law fixing what is unreasonable, and therefore prohibited. *In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice.* * * * Such orders, so far as they are administrative, are conclusive. [Italics ours.]

In *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S., 184, 196, this court said:

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate-regulating body, for the reasonableness of rates and *the permissible discrimination based upon difference in conditions are not matters of law.* So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the

> same facts that might be taken by different tribunals. [Italics ours.]

In *Illinois Central R. Co. et al.* v. *Interstate Commerce Commission,* 206 U. S., 441, 460, this court quoted from an English case as follows:

> * * * and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief and no good.

In *Interstate Commerce Commission* v. *Illinois Central R. Co.,* 215 U. S., 452, 470, this court said:

> * * * it is equally plain that such perennial [judicial] powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

In the *Precooling case,* 232 U. S., 199, the carrier assailed the order of the Commission because it only allowed the carrier $7.50 per car for icing, and the carrier claimed it should have been allowed $62.50 per car. The court, at page 221, speaking through Mr. Justice Lamar, said:

> All these are matters committed to the decision of the administrative body, which, in

> each instance, is required to fix reasonable rates and establish reasonable practices. *The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void.* [Italics ours.]

We respectfully submit that the District Court erred in attempting by injunction to change the order of the Commission and to make an order of its own as to rates.

III.

CONFISCATION CAN NOT BE PREDICATED ON INCREASED RATES IF SUCH INCREASED RATES ARE REASONABLE.

The petitioners in the court below claimed confiscation not of their property but of the property of shippers not parties to the suit, if Sacramento, San Jose, Santa Clara, and Stockton should not be given the same transcontinental rates as San Francisco and Oakland. In the first place, the allegation of confiscation is too vague and uncertain to be the foundation of judicial action. Furthermore, confiscation can not be predicated on increased rates if the increased rates are reasonable. If confiscation could be claimed because of increased railroad rates where the increased rates are reasonable, then it would not be possible for railroad carriers ever to increase their rates. Shippers have

no vested rights in railroad rates. Their only right is to a reasonable rate.

In *Galveston C. ber of Commerce et al.* v. *Railroad Commission of Texas et al.*, 137 S. W., 737, 747, the Court of Civil Appeals of Texas said:

> It is further urged by appellees that to change the present system of basing rates on Houston would be an interference with the vested rights of the business men of that city, inasmuch as this system has prevailed for such a great length of time, and they have invested a great deal of money on the faith of its continuance. This would be a very strong argument against any change in rates so as to unjustly discriminate against Houston; but it is not a sound argument in favor of the maintenance of a rate, if any such there be, that unjustly discriminates against Galveston. The doctrine of vested rights can have but a limited application in governmental regulations.

In the *Willamette Valley case,* 219 U. S., 433, it appeared that the Southern Pacific Company had in force for many years rates under which numerous lumber mills had been constructed along the line of that railroad. The Southern Pacific proposed to increase its rates, and it was conceded that the proposed increased rates were reasonable. It was also claimed that the lumber interests had expended large sums of money in reliance upon the rates in effect, and that by this circumstance the carrier was estopped from increasing the rates, although the

increased rates might not be unreasonable. This court held that this view was erroneous. The only thing to be considered, said this court, is the reasonableness of the increased rates.

IV.

PETITIONERS FILING COMPLAINT IN THE DISTRICT COURT HAD NO SUCH INTEREST IN THE PROPERTY AFFECTED BY THE ORDERS IN CONTROVERSY AS ENTITLED THEM TO MAINTAIN THIS SUIT.

It should be noted that the allegation of confiscation is made in the petition filed in the court below not by shippers but by trade bodies and traffic associations which, so far as the petition shows, have no financial interest whatever in this controversy, but which allege that the property of citizens of certain towns and cities will be confiscated if the carriers are permitted to charge the rates allowed in the Commission's order.

Even if confiscation could be predicated on increased rates where the increased rates are reasonable, the complaint of confiscation would have to be made by some person or organization whose property would be confiscated, and not by trade organizations and cities which do not claim to have any property to be confiscated and which have no standing in court to make a complaint of that character.

A suit for injunction can not be maintained by any person or any organization unless that person or organization has a financial interest in the subject matter of the litigation. The only interest about

which a party can be heard to complain in a judicial tribunal is one which directly affects some legal or equitable right.

In *Mayor, etc., of Georgetown*, v. *The Alexandria Canal Co. et al.*, 12 Pet., 91, 99, a suit was brought by the municipal corporation of Georgetown, D. C., to enjoin the construction of an aqueduct across the Potomac River, a part of which was within the corporate limits of that city. There was no showing that the municipal corporation had any property right affected or damaged, but it was stated that the suit was brought by the corporation in its representative capacity to protect the interest of its citizens. This court, holding that the mere general interest which a city may have in its citizens, or which one citizen may have in his city, is insufficient, and that there must be some direct financial interest which is affected in order to constitute the foundation of a suit in equity, said:

> There are, indeed, cases in which it is competent for some persons to come into a court of equity, as plaintiffs for themselves and others having similar interests; such is the familiar example of what is called a creditor's bill. But in that, and all other cases of a like kind, the persons, who by name bring the suit and constitute the parties on the record, have themselves an interest in the subject matter which enables them to sue, and the others are treated as a kind of co-plaintiffs with those named, although they themselves are not named: but in this case

it has been already said that the appellants have no such interest as enables them to sue in their own name, and consequently the whole analogy fails.

In *Board of Trade* v. *Christie Grain & Stock Company,* 198 U. S., 236, the Chicago Board of Trade brought suit against the Christie Grain Co. to enjoin the latter from using the market quotations obtained and used without authority of the board of trade. This court held that the board of trade had a property interest in these quotations, and therefore could maintain the suit.

In the *Ellerman case,* 105 U. S., 166, 173–174, the city of New Orleans had assigned to one Ellerman its right to build levees and wharves on the Mississippi River. The General Assembly of the State granted to a railroad company the right to maintain a wharf at a specified point for its own use, and exempted it from the supervision and control which the municipal authorities exercised in the matter of public wharves. Ellerman brought suit in the United States Circuit Court for the District of Louisiana to enjoin the construction of the railroad wharves. Upon the question of "*interest*" he claimed that the competition *would affect his revenues.* This court, speaking through Mr. Justice Matthews, said:

> The sole remaining question then is, whether Ellerman, as assignee of the city, has any legal *interest which entitles him* to enjoin the company from using its wharf as

> a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, *it can only consist in preventing competition with himself* as a wharfinger, which such more extensive use of the railroad property would create. * * * *The legal interest which qualifies a complainant other than the State itself* to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * *The only injury* of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. [Italics ours.]

The interest of a community in a rate does not vest in that community the right to maintain an injunction suit. The orders of the Commission did not operate to diminish the value of any property owned by the petitioners.

Under section 13 of the act any organization or any city, without a showing of financial interest, has a right to bring a proceeding before the Commission, but it does not follow that an injunction suit could be maintained in a court without some such interest as a basis. The right to intervene is one thing—that is, the right to be heard in a suit insti-

tuted by another—but the right to *bring suit* is a different proposition. There is no provision of law anywhere that gives any organization or city the right to sue in a representative capacity. The suit filed in the District Court, so far as interest is concerned, might just as well have been brought by the Chicago Board of Trade or the Boston Board of Trade or by any other organization as by these voluntary associations, which do not claim to have any financial interest in the controversy.

V.

THE CHANGED CONDITIONS OTHER THAN THE ELIMINATION OF WATER COMPETITION REFERRED TO IN SECTION 4 HAVE NO APPLICATION TO THE CASE AT BAR.

Petitioners in the District Court urged that where, under section 4, rates have been reduced by a carrier they may not be increased except for some reason other than the elimination of water competition. This point was made before the Commission and considered in *San Jose Chamber of Commerce et al.* v. *Atchison, T. & S. F. Ry. Co. et al.*, 32 I. C. C., 449, 453. The Commission in that case said:

> But even if it be conceded that these three points were given terminal rates by the rail carriers as result of direct competition by the water carriers, this amendment can not be applied to them, as they were given terminal rates by rail many years prior to the passage of the amendment or even the origi-

nal act to regulate commerce. The amendment was passed in June, 1910, and by its express terms applies only to rates thereafter reduced to meet water competition. The condition precedent to the application of the provision against allowing the rail rates to be increased is " whenever a carrier by rail *shall,* in competition with a water route or routes, *reduce* the rates," not whenever a carrier by rail *has,* in competition with a water route, *reduced* the rates. *Westbound Lake-and-Rail Knit Goods Commodity Rates,* 32 I. C. C., 54. The Commission, however, found in the *Intermountain Fourth Section cases, supra,* that " because of railroad competition the steamship lines which reach San Francisco now give these cities (interior cities) the same rates as are given to San Francisco."

Furthermore, it should be noted that the complaint of Sacramento, Stockton, San Jose, and Santa Clara is not that transcontinental rates have been increased as to them, but that the Commission has granted the carriers permission to apply lower rates from the east to San Francisco and cities situated on the ocean than to these non-ocean terminal cities. This is an advantage to which San Francisco, Oakland, and other Pacific coast points situated directly upon the ocean are entitled. The disadvantage of Sacramento as compared to San Francisco is by reason of the location of Sacramento away from the ocean.

Disadvantages in rates due to disadvantageous location do not constitute an undue prejudice or an undue discrimination, either in fact or in law. *Lighterage case, United States* v. *Baltimore & O. R. Co.*, 231 U. S., 274.

It is not the province of the Commission to equalize by rate adjustment dissimilar conditions due to location. *Page Milling Company* v. *Norfolk & W. R. R. Co.*, 30 I. C. C., 605, 612; *Railroad Commissioners* v. *Atchison, T. & S. F. Ry. Co.*, 22 I. C. C., 407, 410; *Wichita Business Association* v. *Atchison, T. & S. F. Ry. Co.*, 30 I. C. C., 45, 55. The act to regulate commerce does not attempt to equalize fortunes, opportunities, or abilities. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S., 42, 46; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S., 433.

Assuming, however, that the effect of the rates filed by the carriers under the order of the Commission is to increase rates to Sacramento, San Jose, Santa Clara, and Stockton, there is nothing in the act to regulate commerce which prohibits this. The Commission found in this case changed conditions other than the elimination of water competition. In fact, this readjustment of rates was brought about by one of the greatest changes in traffic conditions which the world has ever known—the opening of the Panama Canal. In the next place, this provision of section 4 that rates decreased by reason of water competition can not be increased except for

some reason other than the elimination of water competition refers to cases where rail carriers, through the reduction of their rates eliminate water competition. They can not thereafter increase their rates unless the Commission finds that the proposed increase rests upon changed conditions other than the elimination of water competition. There is no such situation here as that contemplated. Here we are considering the cases of a number of towns which had secured terminal rates to which their location did not naturally entitle them. The discontinuance of the absorption by the ocean carriers of the inland locals took away the artificial competitive conditions thereby created and placed these points in a different situation as to competition than points situated directly on the ocean.

VI.

NO BETTER ADJUSTMENT OF THE TRANSCONTINENTAL RATE PROBLEM CAN BE DEVISED THAN THAT PRESCRIBED BY THE COMMISSION WHEREBY THE GREATEST RELIEF FROM THE PROVISIONS OF THE FOURTH SECTION IS AFFORDED TO POINTS WHERE COMPETITION IS GREATEST, THAT IS, AT OCEAN TERMINALS.

Under the orders of the Commission Sacramento secures a lower rate than Salt Lake City, because Sacramento is nearer to the ocean competition at San Francisco than Salt Lake City, and to that extent is entitled to the advantage of its location. While its location is more advantageous for rate purposes than that of Salt Lake City, it is not so

advantageously situated as San Francisco, which is directly on the ocean. Therefore the competitive conditions at San Francisco justify lower rates than to Sacramento, just as the situation of Sacramento justifies lower rates than to Salt Lake City, which latter involves a shorter haul, but at which place competitive conditions do not exist to the extent to which they exist at Sacramento. The Commission in the administration of the act has applied the rule for the determination of what cities should have the lowest transcontinental rates, and in accordance with the principles considered by the Commission to be just, such rates have been restricted to points of direct ocean competition. As to interior cities, the rates are the rates to ocean terminals plus three-fourths of the local back-hauls until the maximum rate is met. This gives each city the benefit of its location. A city 10 miles from the ocean terminal would have a lower rate than a city 20 miles; a city 20 miles a lower rate than a city 30 miles, and so on. That may not be a perfect system, but it recognizes competitive conditions, and the extent of the relief from the operation of the fourth section under this plan goes hand in hand with the rise and decline of the influence of competition.

CONCLUSION.

It is respectfully urged that compliance with the prayer of the petition filed in the District Court was beyond the jurisdiction of that court for the

reason that it had no power to suspend the orders of the Commission in so far as they permitted the carriers a greater extent of relief to San Francisco than to Sacramento. The District Court exceeded its authority in enjoining the carriers from collecting the tariffs filed and published and in effect in accordance with the orders of the Commission. An injunction restraining a carrier from collecting its published rates is an injunction leveled at the act to regulate commerce and should not stand.

The power to prescribe the extent of relief to carriers under the fourth section of the act is vested in the Commission as a primary function and not in the courts. The District Court had no jurisdiction to entertain a petition such as that here under consideration, filed without prior resort to the Commission by organizations admittedly having no financial interest in the matter in controversy.

We ask that the decree of the District Court be reversed and that this cause be remanded to that court with directions that it be *dismissed for want of jurisdiction.*

Respectfully submitted,

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